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Circuit Rift Sends Sound Waves

AN INTERPRETATION OF THE COPYRIGHT ACT'S SCOPE OF PROTECTION FOR DIGITAL SAMPLING OF SOUND RECORDINGS

INTRODUCTION

As the United States Court of Appeals for the Sixth Circuit aptly pointed out in *Bridgeport Music, Inc. v. Dimension Films*,¹ “there is no Rosetta stone for the interpretation of the copyright² statute.”³ A lawyer may need a Rosetta stone to interpret a musical arrangement, however, one needs no such key to decrypt the Copyright Act of 1976.⁴ Despite the ongoing debate over whether the Copyright Act allows a *de minimis*⁵ exception to apply to the unauthorized use of copyrighted sound recordings, interpreting the Act may be simpler than it seems.⁶ A court or practitioner need not look past the plain meaning of the statute to determine that it allows for such an exception, and a more comprehensive statutory interpretation confirms this conclusion—a conclusion which a majority of authorities have favored.⁷ Courts, professionals in the music industry, and scholars have, nonetheless, disagreed on the interpretation of the Copyright Act.⁸ In the summer of 2016, the United States Court of Appeals for the Ninth Circuit formalized the divide by creating a circuit split, in *VMG Salsoul LLC v. Ciccone*, in which it departed from the Sixth

¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

² The term copyright refers to the “bundle of rights” that involve the underlying “right to copy,” and each right can be copyrighted, “sold, assigned, leased, and/or licensed separately.” RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER’S VIEW* 493 (2005) (emphasis in original).

³ *Bridgeport*, 410 F.3d at 805.

⁴ Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

⁵ “*De minimis*” is a Latin phrase that means “trifling” or “negligible.” *De minimis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶ See *infra* Part II.

⁷ See *infra* Section II.B.

⁸ See *infra* Sections II.A.3–4, B.3–4.

Circuit's reasoning in *Bridgeport* by recognizing a *de minimis* exception in the Act.⁹ If this rift remains unresolved, it will continue to send a wave of uneasiness across the music industry that will chill the art of music sampling and drown out the revived sounds of songs past.

On June 2, 2016, the Ninth Circuit acknowledged that it was creating a circuit split in its 2–1 decision in *VMG Salsoul*.¹⁰ There, the court found that Madonna's¹¹ use of a .23 second-long sample of a single horn hit from the 1983 song, "Love Break,"¹² in her 1990 recording of "Vogue,"¹³ did not violate copyright laws.¹⁴ The court came to its decision by applying the *de minimis* exception, finding that a general audience would not be able to identify the sample as a recording from "Love Break."¹⁵ The Ninth Circuit found that Section 114(b)¹⁶ of the Copyright Act does not eliminate the use of the *de minimis* exception in infringement claims involving sound recordings.¹⁷ By doing so, the Ninth Circuit thus departed from the Sixth Circuit's 2005 decision in *Bridgeport*,¹⁸ in which the Sixth Circuit categorically eliminated the *de minimis* exception as a defense for any unauthorized digital sampling.¹⁹

Many have argued that rather than the courts decoding the existing language of the Act, Congress should change the Act's language.²⁰ In light of the split, however, this note argues that instead of waiting for a legislative change—which could result in further confusion or, if Congress explicitly eliminates a *de minimis* exception, a chilling effect on an important

⁹ See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

¹⁰ *Id.* at 874, 886.

¹¹ *Madonna*, MADONNA, <http://www.madonna.com/> [<https://perma.cc/WSU8-QWVH>]. Commonly known only by her first name, Madonna's full name is Madonna Louise Ciccone. See *VMG Salsoul*, 824 F.3d at 874.

¹² SALSOU L ORCHESTRA, OOH, I LOVE IT (LOVE BREAK) (SalSoul Records 1983).

¹³ MADONNA, VOGUE (Sire Records 1990).

¹⁴ See *VMG Salsoul*, 824 F.3d at 874.

¹⁵ See *id.* at 880.

¹⁶ Section 114(b) addresses the scope of a copyright owner's exclusive rights. 17 U.S.C. § 114 (2012).

¹⁷ See *VMG Salsoul*, 824 F.3d at 874, 883–84.

¹⁸ See *id.* at 886–87 (declining to follow the Sixth Circuit). The dissent argued that the court should adhere to the Sixth Circuit's "bright-line rule" that the use of a copyrighted sound recording without a license is infringement. See *id.* at 888–90 (Silverman, J., dissenting).

¹⁹ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–05 (6th Cir. 2005). The phrase "digital sampling" can be used interchangeably with the phrase "music sampling" or "sound sampling." See *id.* This note will use the phrase "digital sampling" in conjunction with the phrase "sound recording."

²⁰ See *infra* Part IV.

artistic practice²¹—the Supreme Court should interpret the language of the Copyright Act to allow for a *de minimis* exception in the use of copyrighted sound recordings.²² A Supreme Court ruling on the issue would clearly resolve the circuit split and would do so more easily and quickly than a congressional change to the Act.

Part I of the note contains an overview of digital sampling, including a discussion of the history of the Copyright Act and an explanation of the *de minimis* exception and related tests in copyright infringement cases involving sound recordings. Part II details the circuit split created by the Sixth Circuit's decision in *Bridgeport* and the Ninth Circuit's decision in *VMG Salsoul*, including the courts' and their supporters' interpretations of the Copyright Act. Part III explains the impact of the circuit split, followed by Part IV, which evaluates possible solutions to the split and ultimately recommends that the Supreme Court interpret the present Copyright Act to allow for a *de minimis* exception to sampling. Next, Part V provides a statutory interpretation approach to determine that the Copyright Act does indeed include a *de minimis* exception for the use of copyrighted sound recordings and that the Supreme Court should reach this conclusion in light of the circuit split.

I. "U CAN'T TOUCH THIS"²³: BACKGROUND ON COPYRIGHT PROTECTION AND SAMPLING OF SOUND RECORDINGS

While digital sampling of sound recordings was not a practice that existed at the time of the country's founding,²⁴ what did exist was the belief that the arts were useful and that creative works should be protected.²⁵ This Section first provides a brief history of copyright protection in the United States and how it evolved to apply to sound recordings. Next, this Section

²¹ See, e.g., KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 19 (2011) (explaining how digital sampling has been particularly instrumental in the development of hip-hop music).

²² This note focuses on the *de minimis* doctrine and the doctrine of substantiality generally and does not seek to provide a recommendation for which specific test of substantiality courts should use. See *infra* Section I.C.

²³ MC HAMMER, *U Can't Touch This*, on PLEASE HAMMER DON'T HURT 'EM (Capitol Records 1990). The names of songs that have sampled or have been sampled are included in the heading of each major part of this note.

²⁴ See John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 211 (2005) (citing Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 149 (1989)).

²⁵ See U.S. CONST. art. I, § 8, cl. 8.

provides an overview of what digital sampling of sound recordings is, followed by an explanation of the *de minimis* exception and the legal tests applied to claims of copyright infringement of sound recordings.

A. *Copyright Protection of Sound Recordings*

The founders of the United States of America recognized the importance of protecting creations by including the Copyright Clause in the U.S. Constitution.²⁶ It reads: “The Congress shall have the power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²⁷ The First Congress exercised such power, and on May 31, 1790, President George Washington signed the nation’s first copyright law, which granted “authors of ‘maps, charts, and books’ the exclusive right to ‘print, reprint, publish or vend’ their works for . . . up to twenty-eight years.”²⁸ Since then, “[w]hatever the vehicle for change,” copyright law looks very different than it did when Congress passed the original Copyright Act.²⁹ What has not changed, however, is that copyright laws are formulated to balance the interest in protecting original works with the interest against stifling creativity,³⁰ thereby furthering the purpose of the Copyright Clause.³¹

One major change to the copyright laws came in 1831, when Congress deemed music a “useful art” within the meaning of the Constitution’s Copyright Clause³² and finally included music as a type of work “eligible for federal

²⁶ *See id.*

²⁷ *Id.*

²⁸ *See* EDWARD B. SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 14–15, 31 (1st ed. 2000) (asterisk omitted) (quoting Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124); *see also* David S. Blessing, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2405 (2004) (citing Act of May 31, 1790, ch. 15, 1 Stat. 124).

²⁹ SAMUELS, *supra* note 28, at 5.

³⁰ *See* Blessing, *supra* note 28, at 2406.

³¹ In 1975, the U.S. Supreme Court summarized copyright’s purpose as follows:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

SCHULENBERG, *supra* note 2, at 494 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

³² SCHULENBERG, *supra* note 2, at 494 (quoting U.S. CONST. art. I, § 8, cl. 8); *see* Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436.

copyright.”³³ Over a hundred years and many technological advances later, Congress revised the Copyright Act in 1971 by adding copyright protection for sound recordings through the Sound Recording Amendment.³⁴ It was not until this amendment that sound recordings were protected by a separate copyright.³⁵ Since 1972, most “records, tapes, and CDs” have involved two separate copyrights: (1) the copyright in the music itself (i.e., the written composition), which “belongs to the composer and extends to the making, distribution or performance of the song,” and (2) the copyright in the sound recording, which “belongs to the record company . . . and extends only to the making or distribution of that particular recording of the song.”³⁶ The Copyright Act underwent several more revisions, the most recent of which was in 1976.³⁷ The premise of the Copyright Act of 1976 is that there is a distinction between a work and its copyright,³⁸ and sound recordings and their corresponding musical compositions continue to be treated as separate works with their own copyrights.³⁹

The Copyright Act of 1976 further expands the scope of protection for music,⁴⁰ but limits the scope of copyright for

³³ SAMUELS, *supra* note 28, at 31; *see* Copyright Act of 1831 § 1.

³⁴ *See* Schietinger, *supra* note 24, at 216 (citing Sound Recording Amendment of 1971, Pub. L. No. 92–140, 85 Stat. 391). The amendment was Congress’s response to record and tape piracy, which “reached epidemic proportions in the 1960s and 1970s,” and it was “effective for records made after February 15, 1972.” SAMUELS, *supra* note 28, at 45.

³⁵ *See Bridgeport*, 410 F.3d at 800 (“Although musical compositions have always enjoyed copyright protection, it was not until 1971 that sound recordings were subject to a separate copyright.”).

³⁶ SAMUELS, *supra* note 28, at 45; *See* Caitlin Kowalke, *Survey Says: “Blurred Line” Call for Reliable Aid in the Adjudication of Composition Infringement Actions*, 32 ENT. & SPORTS LAW 24, 24 (2016). The Sixth Circuit in *Bridgeport* noted that “[t]he analysis that is appropriate for determining infringement of a musical composition copyright, is not the analysis that is to be applied to determine infringement of a sound recording.” *Bridgeport*, 410 F.3d at 798. This note deals with copyright infringement of sound recordings, not musical compositions.

³⁷ Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)); *See* SAMUELS, *supra* note 28, at 55 (Although the last major revision of the act was in 1976, “Congress clarified and cautiously extended copyrights in separate amendments in 1984, 1992, 1995, and 1998.”); *see also* Blessing, *supra* note 28, at 2405 n.48.

³⁸ *See* LYMAN R. PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT* 92–93 (1991) (The 1976 Act’s premise “is that its subject matter is the copyright of a work, not the work itself. . . . In theory [the distinction between a work and its copyright] has been true of all American copyright statutes since the 1790 act, and indeed the premise is mandated by the copyright clause.”).

³⁹ 17 U.S.C. § 102(a)(2), (7) (2012).

⁴⁰ *See* PATTERSON & LINDBERG, *supra* note 38, at 93 (“The narrow scope of copyright in previous statutes,” meant the Act’s premise was utilized but unarticulated, “and beyond the narrow scope of copyright the statutes themselves provided little internal evidence of it.” The 1976 Act, however, “so enlarged the scope of

sound recordings.⁴¹ Section 114 of the Copyright Act of 1976 details the “[s]cope of exclusive rights in sound recordings,”⁴² and subsection (b) provides in relevant part that under the first clause of Section 106, a copyright owner’s exclusive right in a sound recording “is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”⁴³ Section 114(b) also provides that, under Section 106,⁴⁴ a copyright owner’s exclusive rights in a sound recording “do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though sounds imitate or simulate those in the copyrighted sound recording.”⁴⁵ This subsection of Section 114 of the Copyright Act is the focus of this note, which will provide a statutory interpretation of this subsection and other relevant sections in Part V.⁴⁶

B. Sampling of Sound Recordings

The Copyright Act defines a sound recording as “result[ing] from the fixation of a series of musical, spoken, or other sounds.”⁴⁷ “Sampling” of sound recordings has been defined as “the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo.”⁴⁸ In other words, the “the sound recording itself” is being sampled.⁴⁹ For example, MC Hammer pulled a sound recording from Rick James’s song, “Super Freak,” and used that exact recording in his song, “U Can’t Touch This.”⁵⁰ Artists have been employing this practice through the use of a

copyright that the importance of the premise comes to the forefront, and evidence of the premise is abundant.”).

⁴¹ See 2 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 14:46.3.

⁴² Copyright Act of 1976 § 114.

⁴³ *Id.* at § 114(b).

⁴⁴ Section 106 of the Copyright Act provides for “[e]xclusive rights in copyrighted works,” and pursuant to its first two clauses, copyright owners have the exclusive right to “reproduce the copyrighted work in copies or phonorecords” and “to prepare derivative works based upon the copyrighted work.” *Id.* at § 106.

⁴⁵ *Id.* at § 114(b).

⁴⁶ See *infra* Part V.

⁴⁷ Copyright Act of 1976 § 101.

⁴⁸ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 875 (9th Cir. 2016) (citing *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2002)).

⁴⁹ MCLEOD & DICOLA, *supra* note 21, at 77.

⁵⁰ See Pat Pemberton, *U Can’t Touch This*, ROLLING STONE (June 14, 2012), <http://www.rollingstone.com/music/news/u-can-t-touch-this-mc-hammer> [<https://perma.cc/NH7B-P6HQ>].

technological device known as a “sampler” since the 1960s when the technology was first developing.⁵¹

Since “the underlying notes, chords, melody and rhythm of the song” are inseparable aspects of the sample, sampling implicates both the musical composition copyright and the sound recording copyright.⁵² If sampling would “violate one or both copyrights in a song, then the sampler must obtain permission or a license from the owner(s) of each copyright infringed.”⁵³ The licensing process can be “cost-prohibitive,” causing artists to either “forgo sampling” or sample and risk being sued for copyright infringement.⁵⁴

C. Copyright Infringement of Sound Recordings

To prove copyright infringement, a plaintiff must show that: (1) the plaintiff owns a valid copyright in the work; and (2) the defendant exercised a copyright holder’s exclusive right without authorization.⁵⁵ The latter requires the plaintiff to also show: (i) the defendant “engaged in copying in fact,”⁵⁶ and (ii) there is “substantial similarity . . . between the copyrighted work and the allegedly infringing work.”⁵⁷ The second subpoint is most relevant to this note’s discussion. The substantial similarity requirement suggests that to constitute copyright infringement of a sound recording, the copying must be greater than *de minimis*⁵⁸—“[t]he *de minimis* analysis is therefore a derivation of substantial similarity.”⁵⁹

There are various methods for determining whether there is substantial similarity.⁶⁰ These methods include a

⁵¹ Schietinger, *supra* note 24.

⁵² McLEOD & DiCOLA, *supra* note 21, at 77.

⁵³ *Id.* at 78. This note will not discuss the licensing process in depth.

⁵⁴ John S. Pelletier, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161, 1172 (2012); *see infra* Part III.

⁵⁵ McLEOD & DiCOLA *supra* note 21, at 129, 136 n.29.

⁵⁶ *Id.* at 129. Copying in fact is typically easy to prove and is not a major issue in these types of infringement disputes since “a sample is a literal copy of a sound recording.” *Id.* The sample is typically easy to recognize, and when it is not, forensic technologies can make it easier to identify when a sample has been used. *See id.*

⁵⁷ *Id.*; *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2013).

⁵⁸ *See* Blessing, *supra* note 28, at 2408 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER § 8.01(G) (2000)).

⁵⁹ *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002), *rev’d*, 383 F.3d 390 (6th Cir. 2004) (citing *Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 242 (1983)).

⁶⁰ *See* Mark J. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J. L. SCI. & TECH. 669, 677 (2013).

fragmented literal similarity test and a quantitative and qualitative *de minimis* analysis.⁶¹ The phrase “fragmented literal similarity” is reflective of “the exactness of the similarity” between the part of the recording that is sampled and the sampled copy.⁶² It is “based on literal elements” contained throughout an allegedly infringing work,⁶³ but also recognizes that works that contain samples can be very different from the sources of the samples.⁶⁴ To determine at what point fragmented similarity becomes substantial enough to render sampling an infringement, courts look at the plaintiff’s, or sampled artist’s, work.⁶⁵ If the work of the artist who sampled the plaintiff’s work is “large enough quantitatively or important enough qualitatively,” then substantial similarity exists.⁶⁶ When the portion that was sampled is small, however, some courts conclude that the sample is *de minimis*, and as such, too small for copyright protection.⁶⁷ There are no bright-line rules regarding this quantitative consideration because “the qualitative dimension can always trump,” even if the sample is quantitatively small.⁶⁸ Thus, a fragmented literal similarity test can be used to determine whether a sample is *de minimis*.⁶⁹

⁶¹ See *id.* A third test is the “[c]omprehensive [n]onliteral [s]imilarity” test, but this is not relevant because it looks for “the fundamental essence” of a work being duplicated in another, and a sound recording sample is essentially an exact copy. NIMMER & NIMMER, *supra* note 57, at § 13.03[A][1]. Courts have employed other tests, “including the ordinary-lay-observer test,” “the average-lay-observer test,” and “the total concept and feel” test. Carter, *supra* note 60, at 677. These tests will not be examined in this note.

⁶² MCLEOD & DICOLA, *supra* note 21, at 130 (emphasis omitted).

⁶³ See Carter, *supra* note 60, at 678.

⁶⁴ MCLEOD & DICOLA, *supra* note 21, at 130.

⁶⁵ *Id.*

⁶⁶ *Id.* (internal citations omitted).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *id.* Even if the plaintiff establishes that the defendant engaged in copying in fact and one of the methods indicates there was substantial similarity between the plaintiff’s work and the defendant’s allegedly infringing work, the defendant can sometimes successfully assert the affirmative defense of “fair use.” See NIMMER & NIMMER, *supra* note 57, at § 13.03[A][2][a]. In other words, if a sample does not fall below the *de minimis* threshold, a defendant may still succeed on a fair use defense. See MCLEOD & DICOLA, *supra* note 21, at 145. Courts use a four-factor balancing test codified in the Copyright Act to evaluate a defendant’s fair use defense. See 17 U.S.C. § 107 (2012). The sampler being sued has the burden to establish the fair use defense. See MCLEOD & DICOLA, *supra* note 21, at 130. Courts sometimes conflate the *de minimis* and fair use doctrines. See Carter, *supra* note 60, at 679. Jane Ginsburg, a Columbia law professor, explained that “fair use is moot when a sample falls below the *de minimis* threshold.” MCLEOD & DICOLA, *supra* note 21, at 145. If there is “too little” in the sample, then you do not get to fair use. *Id.* Fair use is different from the lack of substantiality and *de minimis* use defenses because if a sample is fair use, “the sampled portion of the work is still deemed to be protected by copyright” whereas success of the lack of substantiality and *de minimis* use defenses

A defendant can use the *de minimis* defense to assert that the sample is so small (i.e., *de minimis*) that there is a lack of substantial similarity.⁷⁰ The legal maxim, *de minimis non curat lex*, can be translated to “the law does not concern itself with trifles.”⁷¹ The *de minimis* exception is a fundamental principle of common law—not just in the area of copyright.⁷² A major rationale for the exception is that it helps “to avoid the administrative costs of lawsuits when takings are small.”⁷³ In the copyright realm, the *de minimis* exception permits literal copying of small and insignificant portions of the plaintiff’s work.⁷⁴ Successfully asserting the *de minimis* exception means that the copying was so trivial that it falls “below the quantitative threshold of substantial similarity.”⁷⁵ The *de minimis* analysis requires a quantitative and qualitative examination of the work.⁷⁶ The trial court in *Bridgeport* noted, however, the “lack of clear road maps for *de minimis* analyses from the circuit courts or the Supreme Court.”⁷⁷ The Ninth Circuit in *Newton v. Diamond*, however, found that “a use is *de minimis* only if the average audience would not recognize the appropriation.”⁷⁸ Whether the *de minimis* defense—or exception—can be used in cases alleging infringement of a sound recording copyright is the focus of this note.⁷⁹

indicate that “copyright does not protect the portions of the sampled tracks at issue.” *Id.* at 146.

⁷⁰ See Carter, *supra* note 60, at 679.

⁷¹ VMG Salsoul, 824 F.3d at 877 (citation omitted).

⁷² Professor Daniel J. Gervais of Vanderbilt University Law School explained that, “The *de minimis* doctrine is not a copyright doctrine, but a rule from Roman law. It is essentially a worldwide rule, applicable anywhere in Europe and in most legal systems [he] can think of.” Steven Seidenberg, *US Perspectives: US Courts Split on Legality of Music Sampling*, INTELLECTUAL PROP. WATCH (June 28, 2016), <http://www.ip-watch.org/2016/06/28/us-courts-split-on-legality-of-music-sampling/> [<https://perma.cc/9QV9-B2SQ>].

⁷³ MCLEOD & DICOLA, *supra* note 21, at 141.

⁷⁴ RAYMOND J. DOWD, COPYRIGHT LITIGATION HANDBOOK § 13:30 (2d ed. 2016) (internal citations omitted).

⁷⁵ *Id.*

⁷⁶ See *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002) (citing *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002)), *rev’d*, 383 F.3d 390 (6th Cir. 2004).

⁷⁷ *Id.* at 840.

⁷⁸ *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003) (citing *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986), *amended and superseded by* 388 F.3d 1189 (9th Cir. 2004) (finding that a *de minimis* exception applied to the unauthorized use of a copyrighted musical composition)).

⁷⁹ The Sixth Circuit in *Bridgeport* did not explicitly discuss fair use. See MCLEOD & DICOLA, *supra* note 21, at 146.

II. “SOS”⁸⁰: THE CIRCUIT SPLIT

Even prior to the Ninth Circuit creating the circuit split, the Sixth Circuit’s *Bridgeport* decision faced criticism, and there was a divide in the legal field and in the music industry as to whether the court properly ruled that there was no *de minimis* exception for the unauthorized use of copyrighted sound recordings.⁸¹ Prior to *Bridgeport*, the law on sampling was “murky,” and although using a portion of a copyrighted song perked up peoples’ ears, using a very small portion could be defended as *de minimis*.⁸² While district courts had ruled on the *de minimis* exception, there was a dearth of appellate decisions, which left artists without guidance on the matter.⁸³ The Sixth Circuit’s decision in *Bridgeport* in 2005 was the first appellate decision on the issue.⁸⁴

As the Sixth Circuit pointed out in *Bridgeport*, “sound recording copyright holders[,] . . . studio musicians and their labor organization[s]” favor the interpretation that the unauthorized taking of a sample of a copyrighted sound recording is infringement, regardless of the size of the sample.⁸⁵ On the other hand, many hip hop artists view this interpretation as “stifling creativity.”⁸⁶ Despite this distinction, “today’s sampler is tomorrow’s samplee,” and artists could easily change their tune depending on whether they are a sampler or a samplee.⁸⁷ In 2016, the Ninth Circuit departed from the Sixth Circuit and ruled in favor of today’s sampler, thereby creating a circuit split.⁸⁸

The following two Sections detail the circuits’ stances on the *de minimis* exception in *Bridgeport* and *VMG Salsoul*. These Sections recount the impugned sample, the procedural history, each court’s interpretation of the Copyright Act, and the holding for both cases, respectively.⁸⁹ Each case description concludes with an overview of the authorities that support the interpretation set forth in each case, noting whether those

⁸⁰ RIHANNA, *SOS* (Def Jam Recordings 2006).

⁸¹ See Bill Donahue, *9th Circ. Down the Gauntlet on Music Sampling*, LAW 360 (June 4, 2016), <http://www.law360.com/articles/803236/9th-circ-throws-down-the-gauntlet-on-music-sampling> [<https://perma.cc/LWL3-4NHC>].

⁸² *Id.*

⁸³ *Id.*; see *infra* note 117.

⁸⁴ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

⁸⁵ *Id.* at 801–04.

⁸⁶ *Id.* 803–04.

⁸⁷ *Id.* at 804.

⁸⁸ See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

⁸⁹ See *infra* Sections II.A–B.

authorities supported the position before or after the respective case was decided.⁹⁰

A. *Sixth Circuit Stifles Creativity in Bridgeport Music v. Dimension Films*

1. The Sample

The sample in question in *Bridgeport* was merely a two-second guitar riff from George Clinton Jr. and the Funkadelic's song "Get Off Your Ass and Jam" (Jam).⁹¹ This two-second sample from the song was copied, or "looped,"⁹² and extended for sixteen beats in the song "100 Miles and Runnin'" (100 Miles), which was used in the sound track of the film, *I Got the Hookup*.⁹³ The sample appears in five places in "100 Miles" with "each looped segment last[ing] approximately 7 seconds."⁹⁴

2. The Procedural History

In 2001, Plaintiffs Bridgeport Music, Inc., Westbound Records, Inc., Southfield Music, Inc., and Nine Records, Inc. brought an action alleging nearly 500 counts of copyright infringement along with state law claims regarding the unauthorized use of samples in new rap recordings against approximately 800 defendants—including No Limit Films for the sample in "Jam."⁹⁵ Bridgeport Music and Southfield Music were involved in the music publishing business and "exploit[ed] musical composition copyrights," and Westbound Records and Nine Records recorded and distributed sound recordings.⁹⁶ Bridgeport Music and Westbound Records claimed to own both the musical composition and sound recording copyrights in "Jam."⁹⁷ There was no dispute

⁹⁰ See *infra* Sections II.A.4, II.B.4.

⁹¹ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

⁹² Looping is the process of playing a segment over and over. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1596 (4th ed. 2010).

⁹³ See *Bridgeport*, 410 F.3d at 796.

⁹⁴ *Id.* The segment appears "at 0:49, 1:52, 2:29, 3:20 and 3:46." *Id.*

⁹⁵ See *id.* at 795.

⁹⁶ *Id.* "Bridgeport and companies like it hold portfolios of old rights (sometimes accumulated in dubious fashion) and use lawsuits to extort money from successful music artists for routine sampling, no matter how minimal or unnoticeable." Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That's Destroying Hip-Hop*, SLATE (Nov. 16, 2006), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html [<https://perma.cc/AH5C-4WUQ>].

⁹⁷ See *Bridgeport*, 410 F.3d at 796.

that a two-second sample from a guitar riff in “Jam” was digitally sampled in the recording “100 Miles.”⁹⁸

The district court granted summary judgment to No Limit Films on Bridgeport Music’s and Westbound Records’s infringement claim.⁹⁹ It found that “a jury could reasonably conclude” that the sample from “Jam” was entitled to copyright protection because it was original and creative,¹⁰⁰ but that under either a *de minimis* analysis or fragmented literal similarity test, the sampling did not reach the level of constituting an illegal appropriation.¹⁰¹ The district court further noted that a reasonable jury would not recognize the sample’s source unless someone identified the source for them, even if the jury was familiar with the original musician’s works.¹⁰²

3. The Sixth Circuit’s Interpretation of the Copyright Act

In 2005, Plaintiffs appealed to the Sixth Circuit.¹⁰³ That court interpreted Section 114(b) as providing sound recording owners with “the *exclusive* right to ‘sample’ [their] own recording[s].”¹⁰⁴ The court reasoned that Section 114(b) says sound recording copyright holders’ rights “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though sounds imitate or simulate those in the copyrighted sound recording.”¹⁰⁵

The court provided a number of reasons for why this was the appropriate interpretation of the section.¹⁰⁶ First, the court noted that enforcement of the section is relatively simple: “[g]et a license or do not sample.”¹⁰⁷ Second, the court explained

⁹⁸ See *id.* at 795–96. For a comparison of *Jam* and *100 Miles*, see N.W.A.’s ‘100 Miles and Runnin’ Sample of Funkadelic’s ‘Get Off Your Ass and Jam’, WHO SAMPLED, <http://www.whosampled.com/sample/35629/N.W.A-100-Miles-and-Runnin-%27-Funkadelic-Get-Off-Your-Ass-and-Jam/> [https://perma.cc/QC25-QT2G].

⁹⁹ See *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830, 842–43 (M.D. Tenn. 2002), *rev’d*, 383 F.3d 390 (6th Cir. 2004).

¹⁰⁰ *Id.* at 839.

¹⁰¹ See *id.* at 841; see also Section I.C.

¹⁰² See *Bridgeport*, 410 F.3d at 797. There were other claims discussed in the Sixth Circuit’s decision that are not relevant to this note’s discussion. See *id.* Among the claims, there was a claim regarding the issue of copyright ownership (which the district court denied as moot), an issue involving denial of a motion to amend, and a claim involving attorney’s fees and costs. See *id.*

¹⁰³ See *id.* at 795.

¹⁰⁴ *Id.* at 800–01 (emphasis added).

¹⁰⁵ *Id.* at 800 (emphasis added) (quoting 17 U.S.C. § 114(b) (2012)).

¹⁰⁶ *Id.* at 801.

¹⁰⁷ *Id.*

that “the market will control the license price,” and a license fee cannot be “greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording.”¹⁰⁸ Third, the court pointed out that “sampling is never accidental.”¹⁰⁹ After going through this analysis, the court indicated that the reason why one cannot take a couple notes from a sound recording but can take a couple notes from a musical composition is because (1) it “is dictated by the statute,” and (2) a small sample of a sound recording is valuable.¹¹⁰ Thus, aside from examining the statutory text, the Sixth Circuit also considered the nature of a sound recording.¹¹¹ The court reasoned that regardless of how small a sound recording is, the part taken has value, which is evidenced by the fact that the sampler “intentionally sampled because it would (1) save costs, or (2) add something to the new recordings, or (3) both.”¹¹² The court further argued that “[i]t is a physical taking rather than an intellectual one” because the sounds are taken directly from a fixed medium.¹¹³

In light of its interpretation of Section 114(b), the Sixth Circuit found that “something approximating a bright-line test” would best serve both the music industry and the courts.¹¹⁴ The court qualified this statement, noting that it should not necessarily be a “one size fits all’ test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.”¹¹⁵ The court noted that when taking into account the district court judge’s “hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent.”¹¹⁶

Having no relevant precedent to rely on,¹¹⁷ the Sixth Circuit reversed the district court’s grant of summary

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 801–02.

¹¹¹ *Id.* at 801–02.

¹¹² *Id.*

¹¹³ *Id.* at 802.

¹¹⁴ *Id.* at 799.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 802.

¹¹⁷ *Id.* The Sixth Circuit noted that the district court in *Bridgeport* “emphasized the paucity of case law on the issue of whether digital sampling amounts to copyright infringement.” *Id.* at 797. The district court in *Bridgeport*

found the following cases involving digital music sampling: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994) (fair use/parody defense); *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) (no infringement; any original elements copied not contained in

judgment and agreed with Westbound Records's argument that "no substantial similarity or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording."¹¹⁸

4. Support for the Sixth Circuit Interpretation

The Sixth Circuit in *Bridgeport* noted that legal scholars have suggested that the court's interpretation of the Copyright Act is correct.¹¹⁹ One author wrote ten years prior to the decision that

it seems like the only way to infringe on a sound recording is to re-record sounds from the original work, which is exactly the nature of digital sound sampling. Then the only issue becomes whether the defendant re-recorded sound from the original. This suggests that the substantial similarity test is inapplicable to sound recordings.¹²⁰

The court references a mere half dozen other scholarly articles that might suggest its decision was correct.¹²¹

Those who view sampling as an economic threat to "the employment of studio and concert performers" would praise the Sixth Circuit's decision in *Bridgeport*.¹²² Some even viewed the alternative outcome as unfair—in 2011, Dean Garfield, President and CEO of Information Technology Industry Council, said, "The concept that . . . you could spend your entire career developing something and because someone decides to take 75 percent of it instead of 100 percent means that you don't have a way of being compensated, to [him], simply sounds unfair."¹²³

musical composition); *Williams v. Broadus*, 60 U.S.P.Q.2d 1051 (S.D.N.Y. 2001) (genuine issues of fact existed as to substantial similarity of works); *Tuff 'N' Rumble Management v. Profile Records*, 42 U.S.P.Q.2d 1398 (S.D.N.Y. 1997) (summary judgment for defendant where plaintiff did not prove copying or substantial similarity); *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993) (summary judgment for defendant denied where facts existed as to substantial similarity); *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991) (infringement found without any substantial similarity analysis); and *Fantasy, Inc. v. La Face Records*, 43 U.S.P.Q.2d 1700 (N.D. Cal. 1997) (pre-1972 sound recording not protected by Copyright Act).

Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 840 n.11 (2002), *rev'd*, 410 F.3d 792.

¹¹⁸ *Bridgeport*, 410 F.3d at 798.

¹¹⁹ *Id.* at 803.

¹²⁰ *Id.* at 801 n.13 (quoting Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "RAP"?*, 37 LOY. L. REV. 879, 896 (1992)).

¹²¹ *Id.* at 798–99 n.7, 801 n.10–11, 802 n.14–15, 804 n.19.

¹²² McGraw, *supra* note 24, at 152.

¹²³ *Digital Music Sampling: Creativity or Criminality?*, NPR (Jan. 28, 2011), <http://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or->

Courts have categorized music sampling as “the most ‘brazen stealing of music’ possible.”¹²⁴ For example, in 1991, in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*,¹²⁵ the Second Circuit began its opinion by quoting the Bible, “Thou shalt not steal.”¹²⁶ The court rejected the defendants’ argument that, because “stealing is rampant in the music business,” their sampling of three words from another song’s composition should be excused.¹²⁷ The court viewed the sampling as not only a violation of the Seventh Commandment, but also of U.S. copyright laws.¹²⁸ Over twenty years later, the Sixth Circuit seemed to agree.¹²⁹ Yet, most courts did not sing to the same tune.¹³⁰

B. *The Ninth Circuit Creates a Rift in VMG Salsoul, LLC v. Ciccone*

Most courts in other circuits that were presented with this issue declined to follow the Sixth Circuit, and both the music industry and other courts have largely seemed to disagree with the Sixth Circuit’s assertion that a bright-line test is in their best interest.¹³¹ The ruling in *Bridgeport* “led to far more conservative sampling in the music industry,” and “[s]eeking a license for samples, even very tiny ones, became an industry standard.”¹³² Those who could not afford a license either did not sample or did not license and risked a lawsuit.¹³³ The Ninth Circuit resolved this dilemma for many in the music industry by correctly finding a *de minimis* exception in the Copyright Act for the unauthorized use of sound recordings. By doing so, however, the Ninth Circuit created a new dilemma—a circuit split.

Criminality [<https://perma.cc/HU72-94UJ>]. While taking 75 percent of something may indeed be unfair, that is precisely what the *de minimis* defense is for—the *de minimis* defense may not in fact be successful in the type of copying that Garfield describes.

¹²⁴ Joshua Crum, *The Day The (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 B.Y.U. L. REV. 943, 952–53 (2008) (quoting *Jarvis v. A & M Records*, 827 F. Supp. 282, 295 (D.N.J. 1993)).

¹²⁵ *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (2d Cir. 1991). The subject of the case was the unauthorized use of a composition, not a sound recording. *Id.* at 183. At issue was who owned the copyright to the song’s composition. *Id.*

¹²⁶ *Id.* (quoting *Exodus* 20:15).

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 n.12 (6th Cir. 2005) (quoting *Grand Upright Music Ltd.*, 780 F. Supp. at 183).

¹³⁰ *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

¹³¹ *See id.* (collecting cases to illuminate “a deep split among the federal courts [that] *already exist[ed]*” prior to *VMG Salsoul* (emphasis in original)); *infra* Section II.B.4.

¹³² Donahue, *supra* note 81.

¹³³ *See id.*

1. The Sample

The sample in the song “Vogue,” recorded by Madonna and Shep Pettibone, is a 0.23-second segment of horns, predominantly trombones and trumpets, from Pettibone’s recording of “Ooh I Love It (Love Break),” referred to as “Love Break.”¹³⁴ The horn hits used in “Vogue” are not exactly as they appear in “Love Break.”¹³⁵ Pettibone modified the single horn hit in “Vogue” by “isolat[ing] the horns by filtering out the other instruments playing at the same time,” “transpos[ing] it to a different key,” “truncate[ing] it,” and “add[ing] effects and other sounds to the chord itself.”¹³⁶ He used the same process for the double horn hit “except that he duplicated the single horn hit and shortened one of the duplicates to create the eighth-note chord from the quarter-note chord.”¹³⁷ He also overlaid sounds from other instruments over the resulting horn hits.¹³⁸

2. The Procedural History

Defendants Madonna and Shep Pettibone recorded “Vogue” in 1990, less than ten years after Pettibone recorded “Love Break.”¹³⁹ Plaintiff VMG Salsoul alleged that Pettibone copied the 0.23-second segment of horns and modified it in the recording of “Vogue.”¹⁴⁰ During trial, the plaintiff’s primary expert “*misidentified* the source of the sampled double horn hit” in his original report.¹⁴¹ The district court “applied the *longstanding legal rule* that ‘de minimis’ copying does not constitute infringement.”¹⁴² The court granted summary judgment to Defendants Madonna and Pettibone on two alternative grounds: (1) “neither the composition nor the sound recording of the horn hit was ‘original’ for purposes of copyright law,” and (2) “even if the horn hit was original, any sampling of the horn hit was ‘de minimis or trivial.’”¹⁴³

¹³⁴ See *VMG Salsoul*, 824 F.3d at 876. For a comparison of “Vogue” and “Love Break,” see *Madonna’s ‘Vogue’ Sample of The Salsoul Orchestra’s Ooh, I Love It (Love Break)*, WHO SAMPLED, [http://www.whosampled.com/sample/26512/Madonna-Vogue-The-Salsoul-Orchestra-Ooh-I-Love-It-\(Love-Break\)](http://www.whosampled.com/sample/26512/Madonna-Vogue-The-Salsoul-Orchestra-Ooh-I-Love-It-(Love-Break)) [<https://perma.cc/X85H-EPPP>].

¹³⁵ See *VMG Salsoul*, 824 F.3d at 879.

¹³⁶ *Id.* at 879–80.

¹³⁷ *Id.* at 880.

¹³⁸ See *id.*

¹³⁹ See *id.* at 875.

¹⁴⁰ See *id.* at 874–75.

¹⁴¹ *Id.* at 880 (emphasis in original).

¹⁴² *Id.* at 874 (emphasis added).

¹⁴³ *Id.* at 876.

3. The Ninth Circuit's Interpretation of the Copyright Act

First, the Ninth Circuit reasoned that if the expert witness, a “highly qualified and trained musician,” who “listened to the recordings with the express aim of discerning which parts of the song had been copied,” could not accurately identify the sample, then a jury would not be able to do any better.¹⁴⁴

Next, the Ninth Circuit conducted a statutory interpretation of the Copyright Act, beginning with Section 102.¹⁴⁵ Section 102(a)¹⁴⁶ lists the types of works of authorship that the Copyright Act protects,¹⁴⁷ which include sound recordings.¹⁴⁸ The court noted that sound recordings are listed among other types of works of authorship with no suggestion of “differential treatment.”¹⁴⁹ The court then turned to Section 106, which provides exclusive rights in copyrighted works, and determined that “nothing in that provision suggests differential treatment of *de minimis* copying of sound recordings.”¹⁵⁰

The court then turned its focus to Section 114(b) and rejected the Sixth Circuit's interpretation of it.¹⁵¹ The court noted that the third sentence of Section 114(b) “imposes an express *limitation* on the rights of a copyright holder”¹⁵² in stating that “[t]he exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording [with certain qualities].”¹⁵³ Although the court was hesitant to read an expansion of rights into Congress's express *limitation* on those rights, it also hesitated to read the text as “an unstated, implicit *elimination*” of the *de minimis* exception in light of the “centuries of jurisprudence” on the “consistent application of

¹⁴⁴ *Id.* at 880; see DOWD, *supra* note 74, at § 13:30.

¹⁴⁵ See *VMG Salsoul*, 824 F.3d at 881.

¹⁴⁶ Section 102(a) of the Copyright Act provides: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2012). Pursuant to subsection 7, works of authorship include sound recordings. *Id.* at 102(a)(7).

¹⁴⁷ It is important to note that Section 102(a) states that the Copyright Act can protect works of authorship in mediums that are “now known or later developed.” *Id.* (emphasis added); see also *infra* Section V.B.

¹⁴⁸ See 17 U.S.C. § 102(a)(7).

¹⁴⁹ *VMG Salsoul*, 824 F.3d at 881–82.

¹⁵⁰ *Id.* at 882.

¹⁵¹ *Id.* at 884.

¹⁵² *Id.* at 883 (emphasis in original).

¹⁵³ *Id.* (alterations and emphasis in original) (citing 17 U.S.C. § 114(b)).

the *de minimis* exception.”¹⁵⁴ Rather, the court found that “[a] straightforward reading of the third sentence” indicates that Congress did not intend for a new recording that merely mimics a copyrighted recording to constitute infringement “so long as there was no *actual* copying.”¹⁵⁵

The Ninth Circuit dismantled the Sixth Circuit’s reasoning in *Bridgeport* by showing that both Congress and the Supreme Court indicate that the *de minimis* rule applies to unauthorized sampling of sound recordings.¹⁵⁶ First, the Ninth Circuit noted that a “physical taking” applies to other forms of artistic works and the court was unable to identify a copyright case creating an exception to the *de minimis* rule within that context.¹⁵⁷ Second, the court argued that even if it accepted the premise that sound recordings are qualitatively different from other copyrightable works, “that theoretical difference does not mean that Congress *actually adopted* a different rule.”¹⁵⁸ Third, the court did not view “the distinction between a ‘physical taking’ and an ‘intellectual one,’” as advancing the Sixth Circuit’s view.¹⁵⁹ The Ninth Circuit acknowledged that the Supreme Court has held that “the Copyright Act protects only the expressive aspects of a copyrighted work.”¹⁶⁰ The court, however, reasoned that the Sixth Circuit’s argument that the sampler has taken expressive content from the original artist is weakened by the fact that such a taking is true regardless of the work’s nature, and yet the *de minimis* test has still applied.¹⁶¹

The Ninth Circuit acknowledged that it was creating a circuit split¹⁶² in holding that “the ‘de minimis’ exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.”¹⁶³ The court “affirm[ed] the summary judgment [motion] in favor of [the] [d]efendants.”¹⁶⁴ Rejecting the “[p]laintiff’s argument that Congress eliminated the ‘de minimis’ exception to claims alleging infringement of a sound recording,”¹⁶⁵ the court agreed with the district court that “a

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *See id.* at 885.

¹⁵⁷ *Id.* at 885.

¹⁵⁸ *Id.* (emphasis in original).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 885 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

¹⁶¹ *Id.*

¹⁶² *See id.* at 886.

¹⁶³ *Id.* at 874; *see also* 17 U.S.C. § 102 (2012).

¹⁶⁴ *See VMG Salsoul*, 824 F.3d at 874.

¹⁶⁵ *Id.*

general audience would not recognize the brief snippet in *Vogue* as originating from *Love Break*.”¹⁶⁶

4. Support for the Ninth Circuit Interpretation

Many professionals in both the legal and music industries who criticized *Bridgeport* applauded the Ninth Circuit’s interpretation of the Copyright Act.¹⁶⁷ The commentators of a leading copyright treatise view the Sixth Circuit’s interpretation as “greatly expand[ing] the scope of copyright in a sound recording by eliminating both the ‘substantial similarity’ requirement and the de minimis rule.”¹⁶⁸ And in light of Congress’s express “intention to *limit* the scope of copyright in sound recordings” in its enactment of Section 114(b), the commentators view the Ninth Circuit’s interpretation as proper.¹⁶⁹ Another authority on copyright has viewed the Ninth Circuit’s ruling in *VMG Salsoul*—which “stands for the somewhat unremarkable proposition that use of a single chord is ‘trivial’ and insufficient to necessitate the need to obtain a license before the chord is used”¹⁷⁰—as “represent[ing] a welcome dose of sanity at a time when the entire music industry risks devouring itself in one giant copyright lawsuit.”¹⁷¹ Professionals in the music industry indeed have welcomed an exception for trivial¹⁷² uses.¹⁷³ For example, prior to the Ninth Circuit decision, Hank Shocklee, “the co-founder and producer of the [hip hop] group Public Enemy and president of Shocklee Entertainment,” believed that “the original copyrights were there to protect the

¹⁶⁶ *Id.* The Ninth Circuit separately found that there was no infringement on the composition copyright. *See id.* at 878–79. Looking to *Newton v. Diamond* as its “leading authority on actual copying,” the Ninth Circuit found that to establish an actionable copyright infringement claim, the copying must be substantial. *Id.* at 877 (citing *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004)). In other words, “the copying [must be] greater than de minimis.” *Id.* The Ninth Circuit applied this rule in *VMG Salsoul*, “conclud[ing] that a reasonable juror *not* conclude that an average audience would recognize the appropriation of the horn hit.” *Id.* at 880 (emphasis in original).

¹⁶⁷ *See* ABRAMS, *supra* note 41, at § 14:46.3; Donahue, *supra* note 81.

¹⁶⁸ *See* ABRAMS, *supra* note 41, at § 14:46.3.

¹⁶⁹ *Id.* (emphasis in original).

¹⁷⁰ Erin E. Rhinehart, *Madonna Doesn’t Need a License to “Vogue,”* 2 TYL IN FOCUS: POPLAW 30 (2015), https://www.americanbar.org/content/dam/aba/publications/young_lawyer/special_issues/ABA_TYL_In_Focus_PopLaw_v002n04_issue.authcheckdam.pdf [<https://perma.cc/9EEF-6Y3W>].

¹⁷¹ Jeff John Roberts, *Madonna’s Copyright Win Is Good News for Fans and Musicians*, FORTUNE (June 6, 2016), <http://fortune.com/2016/06/06/madonna-copyright/> [<https://perma.cc/GC6F-67SU>].

¹⁷² Rhinehart, *supra* note 170, at 30.

¹⁷³ *Digital Music Sampling: Creativity or Criminality?*, *supra* note 123.

entire embodiment of the recording itself, . . . not necessarily the little pieces that [were] coming from it.”¹⁷⁴

Other courts have also supported the Ninth Circuit’s interpretation.¹⁷⁵ Even before the Ninth Circuit decided *VMG Salsoul*, the United States District Court for the Southern District of Florida criticized the Sixth Circuit’s decision in *Bridgeport* under the Eleventh Circuit’s reasoning in a copyright infringement case involving a musical composition.¹⁷⁶ In *Saragema India Ltd. v. Mosley*, the district court noted that the Eleventh Circuit had previously “impose[d] a ‘substantial similarity’ requirement as a constituent element of *all* infringement claims.”¹⁷⁷ The district court in *Saragema* critiqued the Sixth Circuit’s reading of Section 114(b).¹⁷⁸ The court said:

First, Section 114(b)’s derivative-work provision addresses the scope of protection given to derivative works, not original works. There is no indication that Congress sought to expand the scope of protection for *original* works by redefining the term “derivative work” to include all works containing *any* sound from the *original* sound recording, whether those works bear substantial similarities to the original work or not Second, the *Bridgeport* court’s reading of Section 114(b)’s similar-sounding work provision is more expansive than its text and legislative history suggest [A] more plausible reading of this provision is that protection in a copyrighted sound recording “do[es] not extend” to sound recordings which, although *similar-sounding*, do not capture *any* sounds from the copyrighted sound recording.¹⁷⁹

The district court in *Saragema* concluded that Section 114(b)’s language and legislative history do not indicate that the “provision relates to works which are not similar-sounding or that Congress otherwise sought to abandon the substantial similarity inquiry.”¹⁸⁰

Courts in other countries have also recognized a *de minimis* exception in their own jurisdictions.¹⁸¹ Germany’s Constitutional Court ruled that an artist was able to use a looped sample from a two-second recording of another artist’s

¹⁷⁴ *Id.* Shocklee views sampling as an art form. *Id.*

¹⁷⁵ See *Saragema India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009), *aff’d*, 635 F.3d 1284 (11th Cir. 2011).

¹⁷⁶ *Id.* The district court held the allegedly infringing recording and the original song were not substantially similar. *Id.* at 1327.

¹⁷⁷ *Id.* at 1339 (emphasis in original) (citing *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000)).

¹⁷⁸ See *id.* at 1340.

¹⁷⁹ *Id.* at 1341 (emphasis in original).

¹⁸⁰ *Id.* (footnote omitted).

¹⁸¹ See Luke Hill, *Songs and Samples*, LEXOLOGY (June 16, 2016), <http://www.lexology.com/library/detail.aspx?g=16eff294-4a10-4871-9fd4d-50806c35309b> [https://perma.cc/S9KU-ZG9D].

song.¹⁸² The Federal Court of Justice had stated that the use of “even a tiny sliver” would be an infringement, but the Constitutional Court noted that certain types of music rely on sampling and that recreating a sound can be “too costly and time consuming to be practical.”¹⁸³ Thus, there is both national and international support for a *de minimis* exception in this area of law.

III. “BLURRED LINES”¹⁸⁴: IMPACT OF THE SPLIT

There are now different levels of protection for musicians across the country. The future of music sampling, and thus musical creativity, is perhaps more unclear than ever before in light of the circuit split. This Part describes why it is crucial to resolve the debate on sampling by detailing the effects the rift has on the dilemma between licensing and litigating and the implication that has for creativity.

A. *Why Different Levels of Protection for Musicians is Problematic*

While in the twenty-first century an alleged infringement would be nationwide, the protections afforded musicians vary circuit by circuit.¹⁸⁵ Disparate law can lead to forum shopping,¹⁸⁶ especially since “the increasingly national nature of the recording industry renders virtually every venue subject to a potential suit against a major arm of the music industry.”¹⁸⁷ For example, it is reasonable to believe that the Sixth Circuit’s ruling in *Bridgeport* prompted the party suing Justin Bieber over his song, “Sorry,” to file in Tennessee, which is bound by the ruling.¹⁸⁸ That the Sixth and Ninth Circuits are

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ ROBIN THICKE, *BLURRED LINES* (Star Trak Entertainment 2013).

¹⁸⁵ Anna Miller, *Is Music Sampling Bank En Vogue?*, LEXOLOGY: THE TMCA (July 12, 2016), <http://www.lexology.com/library/detail.aspx?g=dcaed9bf-4fa4-48d0-8a23-28ffac026281> [<https://perma.cc/YP95-RQX9>].

¹⁸⁶ *See Note, Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677–78 (1990) (noting that forum shopping is considered to be an “unethical and inefficient” practice).

¹⁸⁷ Eric M. Leventhal, *Would You Want William Hung as Your Trier of Fact? The Case for a Specialized Musicology Tribunal*, 90 TEX. L. REV. 1557, 1580 & n.159 (2012) (citing and quoting Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L. J. 717, 723 (1999)) (“[T]he potential explosion of jurisdictional possibilities makes more poignant the need for a more uniform, nationwide interpretation of the laws on copyright.”).

¹⁸⁸ Roberts, *supra* note 171.

responsible for the split is important in and of itself—the Ninth Circuit includes California courts and the Sixth Circuit includes Tennessee courts.¹⁸⁹ Thus, different rules now govern the major music recording hubs of the country—Los Angeles, Nashville, and Memphis.¹⁹⁰ Many people and companies in the music industry have ties to both Tennessee and California, as the parties did in Justin Bieber’s case,¹⁹¹ and can therefore forum shop between the two states in the hopes of achieving their desired outcome. With the pervasiveness of music sampling in today’s industry, as evidenced by the 800 defendants in *Bridgeport* alone,¹⁹² forum shopping is bound to continue unrestrained so long as the split remains unresolved.

B. *Future of Music Sampling*

Without a resolution of the split, the future of music sampling remains murky. Those in jurisdictions governed by the Sixth Circuit will continue to either obtain a license, not engage in the unauthorized sampling of copyrighted sound recordings, or sample copyrighted sound recordings without a license and risk litigation. As the Sixth Circuit posited in *Bridgeport*, “it would appear to be cheaper to license than to litigate.”¹⁹³ Others have shared this view, believing that “in the litigious environment of the United States, there is nothing to be gained and much money potentially to be lost by being a renegade.”¹⁹⁴ In light of the Ninth Circuit decision in *VMG Salsoul*, however, music samplers may increasingly take the risk of litigation “due to the increased viability of the de minimis exception” within the Ninth Circuit.¹⁹⁵ Many may view the risk of litigation as outweighing the transaction costs

¹⁸⁹ See FEDERAL BAR ASSOCIATION, *About U.S. Federal Courts*, http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx [https://perma.cc/P6KN-E8DA].

¹⁹⁰ Nashville, Tennessee is the self-described “Songwriting Capital of the World.” *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 n.1 (6th Cir. 2016) (Silverman, J., dissenting) (quoting *The Story of Music City, NASHVILLE CONVENTION & VISITORS CORP.*, <http://visitmusiccity.com/visitors/aboutmusiccity/storyofmusiccity> [https://perma.cc/E3AD-U45B]).

¹⁹¹ See Complaint and Demand for Jury Trial at 1–3, *Dienel v. Warner-Tamerlane*, No. 3:16-cv-00978 (M.D. Tenn. filed May 25, 2016).

¹⁹² See *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005).

¹⁹³ *Id.* at 802 (footnote omitted).

¹⁹⁴ David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 621 (1992).

¹⁹⁵ Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, LEXOLOGY (June 28, 2016), <http://www.lexology.com/library/detail.aspx?g=cb00162a-3c71-4853-9b0f-4f6cb644f556> [https://perma.cc/4RN2-Q2ZX].

associated with obtaining a license.¹⁹⁶ While litigating may be the hot approach to take for samplees in the Sixth Circuit and for samplers in the Ninth Circuit, the split may result in a chilling effect on sampling in other jurisdictions, where other circuit courts have not reviewed the issue, because potential samplers may want to avoid any risk.¹⁹⁷

A chilling effect on sampling means a chilling effect on creativity. Sampling itself has become an art—an art that has given rise to hit songs that have out-charted the songs they sampled.¹⁹⁸ Those who favor the Sixth Circuit’s stance may view this as a reason to prohibit the unauthorized use of music sampling because it allows the sampler to surpass the samplee. This phenomena, however, can be used to support music sampling. Songs that out-chart the ones they sampled indicate that music sampling not only revives songs of the past, it gives them new life and contributes to the evolution of music.

Keep in mind that this note does not argue that an artist can sample any length portion of another artist’s song without obtaining a license. Rather, this note’s argument is more *de minimis* than that. If an artist has an ear for a new beat that utilizes a miniscule portion of a guitar riff from another artist’s song, the artist should be able to sample that riff without going through the costly process of obtaining a license, recreating the sound in a studio, or litigating. By having the freedom to sample *de minimis* portions of another artist’s song, artists can continue to revive old songs and contribute to the evolution of certain genres of music—especially hip hop and rap. Eliminating the *de minimis*

¹⁹⁶ Entertainment lawyer Dina Lapolt said there are “two types of samples: the really fucking expensive type, and the really, *really* fucking expensive type.” See MCLEOD & DICOLOA, *supra* note 21, at 158; Dina LaPolt, LAPOLT LAW, <http://lapoltlaw.com/attorneys-staff/dina-lapolt/> [<https://perma.cc/KGX3-HUDQ>].

¹⁹⁷ As discussed in Part II, there was a paucity of case law on the issue when the Sixth Circuit decided *Bridgeport*, and the Ninth Circuit has been the only other circuit court to review the issue since the Sixth Circuit’s decision. See *supra* Sections II.A–B. Although a majority of authorities have seemed to favor the Ninth Circuit’s interpretation, samplers outside of the Ninth Circuit may refrain from sampling—if unable to afford the cost of licensing for such *de minimis* recordings—out of fear that another circuit court will side with the Sixth Circuit’s interpretation. See *supra* Part II. One sample clearance expert noticed that “there is very little sampling going on anymore because it has now become so exorbitantly expensive to do so.” MCLEOD & DICOLOA, *supra* note 21, at 159.

¹⁹⁸ See Gary Trust, *Ask Billboard: What Hits Have Out-Charted the Songs they Sample?*, BILLBOARD (Apr. 4, 2014), <http://www.billboard.com/articles/columns/chart-beat/6039674/ask-billboard-what-hits-have-out-charted-the-songs-they-sample> [<https://perma.cc/JJ3C-NATP>]. Hit songs that have out-chartered the songs they sampled include “Ice Ice Baby” by Vanilla Ice (sampled “Under Pressure” by Queen and David Bowie), “U Can’t Touch This” by M.C. Hammer (sampled “Superfreak” by Rick James), and “SOS” by Rihanna (sampled “Tainted Love” by Soft Cell). See *id.*

exception, on the other hand, can effectively chill the evolution of these genres and would leave it to only those who have the money to advance these genres through sampling. Until there is a resolution of the circuit split, the divide between the circuits that are home to the music capitals of the world will continue to either lead to forum shopping or a chilling effect on the creative practice of sampling.

IV. “UNDER PRESSURE”¹⁹⁹: WHY THE SUPREME COURT SHOULD RESOLVE THE SPLIT

Members of the music industry, commentators, and those in the legal field have interpreted the Copyright Act in various ways and have advocated for different solutions to the issue of whether the Copyright Act allows for a *de minimis* exception for the unauthorized use of copyrighted sound recordings.²⁰⁰ Although some disagree as to the likelihood of congressional action or a Supreme Court decision resolving the issue, many acknowledge that these are the two main ways in which this issue can be resolved.²⁰¹ This author concludes that a Supreme Court decision is needed to resolve the rift.

A. *Congressional Solution*

The Sixth Circuit said that if its interpretation of the Act was not what Congress intended, then the record industry could look to Congress for “clarification or a change in the law”—if that was the case, the Sixth Circuit believed Congress

¹⁹⁹ QUEEN & DAVID BOWIE, *UNDER PRESSURE* (EMI Music Publishing Ltd. 1981). *Under Pressure* was sampled in “Ice Ice Baby.” Dan Epstein, ‘Cool as Ice’: *The Story Behind Vanilla Ice’s Career-Killing Movie*, ROLLING STONE (Oct. 18, 2016), <http://www.rollingstone.com/movies/news/cool-as-ice-the-story-behind-vanilla-ices-doomed-movie-w444728> [<https://perma.cc/J794-HS3Y>].

²⁰⁰ Many view the plain language of the Copyright Act as prohibiting any sampling of sound recordings unless it is the copyright holder who is doing the sampling but do not advocate for a bright-line rule as the Sixth Circuit did in *Bridgeport*. See Carl Eppler, *These Are the Breaks: Applying the Newton test in a New Context to Provide Protection for Rhythmic Material in Musical Works*, 42 U. MEM. L. REV. 413, 430 (2011). Eppler concludes that *Newton*’s substantial similarity test is the best alternative to bright-line rules. *Id.* at 456. Others advocate for the courts to create an entirely new test to determine what constitutes copyright infringement such as a test based on economic factors. See Blessing, *supra* note 28, at 2423.

²⁰¹ Lesley M. Grossberg, *A Circuit Split at Last: Ninth Circuit Recognizes De Minimis Exception to Copyright Infringement of Sound Recordings*, LEXOLOGY: COPYRIGHT, CONTENT, AND PLATFORMS (June 21, 2016), <http://www.lexology.com/library/detail.aspx?g=02f96741-68b8-4883-bc80-8b5b649d51c6> [<https://perma.cc/3KRK-EJPD>] (“While congressional action or a Supreme Court decision could resolve this split, neither seems particularly likely, at least for the foreseeable future, notwithstanding the prevalence of the act of sampling in the music industry.”).

was better suited to solve this issue.²⁰² Practitioners have surmised that the Ninth Circuit's decision in *VMG Salsoul* "could pave the way for reform of the licensing regime for digital samples that took root after *Bridgeport*," which can come in the form of a congressional change of the copyright laws.²⁰³ In 2012, one author proposed a legislative change and suggested treating sampling, of both musical compositions and sound recordings, as a fair use so long as the sample is not sufficiently substantial.²⁰⁴ The author noted, however, that a legislative change implementing a new scheme "can be a time consuming and lengthy process."²⁰⁵

Of even greater concern, as public choice theory can explain, is that a congressional change is subject to capture and control by the music industry.²⁰⁶

Public choice theory posits that groups have the incentive to lobby for passage of legislation that will confer concentrated benefits on the group. So long as the costs the legislation imposes on others are dispersed, opponents will have less incentive to oppose the legislation. As a result, legal rules can be expected to favor the interests of well-organized and politically influential interest groups at the expense of more diffuse groups.²⁰⁷

Under this theory, if the issue is left to Congress to resolve, the most well-organized and politically influential interest groups within the music industry may lobby enough to have Congress alter the language of Section 114(b) to read how they want it to. While the majority of authorities favor a *de minimis* exception, as evidenced by the criticism of *Bridgeport* and the praise for *VMG Salsoul*, a Congressional change does not preclude the possibility of *Bridgeport* supporters prevailing.²⁰⁸ Since the "intellectual property industries have framed what are essentially technological threats to their interests in the high moral language of truly grievous wrongs," such as theft and piracy, those who are against the *de minimis* exception may successfully lobby Congress with this framing mechanism.²⁰⁹

²⁰² *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

²⁰³ Bentz & Busch, *supra* note 195.

²⁰⁴ See Pelletier, *supra* note 54, at 1194; *see also supra* note 69 and accompanying text.

²⁰⁵ *Id.* at 1198.

²⁰⁶ See Clarissa Long, *The Political Economy of Trademark Dilution*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 137 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

²⁰⁷ *Id.* (footnote omitted).

²⁰⁸ *See supra* Sections II.A.4, II.B.4.

²⁰⁹ Samuel Murumba, *Foxes and Hedgehogs at the Intersection of Human Rights and Intellectual Property*, 38 *MONASH U. L. REV.* 119, 128 (2012).

In 2011, Professor Kembrew McLeod, a leading expert in copyright,²¹⁰ appeared to favor a congressional change in saying, “I think we need to revisit . . . what Congress did a hundred years ago when they rethought copyright law and . . . basically enabled the 20th century music industry to exist because the music industry was based largely on cover songs.”²¹¹ He changed his tune, however, after the Ninth Circuit decision and suggested that the Supreme Court would need to review the issue to achieve clarity.²¹²

B. *Judicial Solution*

A judicial solution could come from the courts in one of two ways: (1) other circuits can follow the Ninth Circuit and reject the Sixth Circuit’s decision in *Bridgeport* so that it becomes “something of an aberration,” or (2) the Supreme Court, responding to the circuit split, can “offer clear, nationwide guidance on how copyright law should cover sampling.”²¹³ Although McLeod originally discussed the possibility of Congress changing the language of Section 114(b) to clarify its meaning and perhaps impose “a quantitative threshold for *de minimis* use” of sound recordings,²¹⁴ after the circuit split he said, “If there’s ever going [to] be any real clarity, the Supreme Court needs to review the issue.”²¹⁵

C. *Recommendation*

A judicial resolution of the circuit split, specifically in the form of a Supreme Court ruling for nationwide clarity, could quickly and clearly resolve the issue rather than a congressional change that could lead to further confusion after years of lobbying by the music industry. The Supreme Court, unlike Congress, is not subject to the pressures of the music industry and many of its members’ “rhetorical moralising.”²¹⁶ Furthermore, Congress “lacks the capacity, time, and expertise” in this area to get the solution “just right.”²¹⁷

²¹⁰ MCLEOD & DICOLA, *supra* note 21.

²¹¹ *Digital Music Sampling: Creativity or Criminality?*, *supra* note 123.

²¹² See Donahue, *supra* note 81.

²¹³ *Id.*

²¹⁴ See MCLEOD & DICOLA, *supra* note 21, at 233.

²¹⁵ Donahue, *supra* note 81.

²¹⁶ Murumba, *supra* note 209 (“Intellectual property industries have framed what are essentially technological threats to their interests in high moral language of truly grievous wrongs: theft, piracy, and even serial murder.”); see also Long, *supra* note 206, at 146–47.

²¹⁷ MCLEOD & DICOLA, *supra* note 21, at 217.

Although the Supreme Court may not have expertise in copyright policy specifically, the Court has expertise in statutory interpretation. Thus, the Supreme Court is best suited to resolve this split so that professionals in the music industry are clearly allowed the same scope of creativity regardless of where in the country they choose to create their music.

V. “STAIRWAY TO [THE SOLUTION]”²¹⁸: A STATUTORY INTERPRETATION OF THE COPYRIGHT ACT

This Part sets forth a statutory interpretation approach that the Supreme Court should use to clarify that Section 114(b) allows for a *de minimis* exception for the unauthorized use of sound recordings. There is no single method to conduct statutory interpretation; however, popular canons of construction that have been codified in many jurisdictions include an examination of the plain or literal meaning of the statute, the enactment history, and the statutory structure—all of which the Ninth Circuit examined in *VMG Salsoul*.²¹⁹ The statutory interpretation analysis conducted in the following Sections is similar to that conducted by the Ninth Circuit but with an express focus on the purpose of copyright law and an examination of the jurisprudence in this area of law. The Supreme Court should conduct the statutory interpretation analysis set forth below to resolve the split and to provide the music industry with clear parameters of the Copyright Act.

A. *Plain Meaning*

The Sixth Circuit asserted it took a “literal reading” approach” to analyzing the Copyright Act in *Bridgeport*.²²⁰ But the court erred in its “literal” reading of the Copyright Act. In fact, the plain meaning of Section 114(b) does not even address the issue of whether parts of a sound recording can be sampled without authorization.

The first two sentences of Section 114(b) of the Copyright Act read:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is *limited* to the right to duplicate the

²¹⁸ LED ZEPPELIN, *STAIRWAY TO HEAVEN* (Atlantic 1972).

²¹⁹ See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881–86 (9th Cir. 2016); see generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L. J. 341 (2010) (detailing the “prevailing theories of statutory interpretation in the context of the widespread codification of canons”).

²²⁰ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is *limited* to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.²²¹

These first two sentences *limit* the scope of copyright protection in sound recordings.²²² They do not expand it in any way—and they certainly do not expand copyright protection in a way that eliminates the possibility of a *de minimis* exception for the unauthorized use of sound recordings. Simply put, there is no mention of a *de minimis* exception, but the first two sentences of Section 114(b) do not preclude the existence of an exception either. The Ninth Circuit in *VMG Salsoul*, however, only focused on the third sentence as imposing an express limitation on a copyright holder's rights.²²³

The third sentence of Section 114(b) of the Copyright Act reads:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.²²⁴

This sentence “validat[es] entire sound-alike recordings.”²²⁵ In other words, a copyright owner's rights in his or her sound recording do not protect the owner from another person imitating the entire sound recording.²²⁶ The word “entirely” does not indicate that the copyright owner has the exclusive right to sample his or her own recording, as the Sixth Circuit determined.²²⁷ The Ninth Circuit, however, merely rejected the Sixth Circuit's interpretation without explaining the Sixth Circuit's misinterpretation and misplaced emphasis on the

²²¹ 17 U.S.C. § 114(b) (2012) (emphasis added). As explained earlier in this note, Section 106 of the Copyright Act provides for “exclusive rights in copyrighted works,” and pursuant to its first two clauses, copyright owners have the exclusive right to “reproduce the copyrighted work in copies or phonorecords” and “to prepare derivative works based upon the copyrighted work.” *Id.* § 106. A “derivative work” is “based upon one or more preexisting works, such as a . . . sound recording . . . or any other form in which a work may be recast, transformed, or adapted.” *Id.* § 101. It can consist “of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.” *Id.*

²²² ABRAMS, *supra* note 41, at § 14:46.3.

²²³ See *VMG Salsoul*, 824 F.3d at 883.

²²⁴ 17 U.S.C. § 114(b).

²²⁵ NIMMER & NIMMER, *supra* note 57, at § 13.03[A][2][b].

²²⁶ See *id.*

²²⁷ See *supra* Section II.A.3.

word “entirely.”²²⁸ The Ninth Circuit should have explicitly addressed the Sixth Circuit’s error and emphasized the fact that the third sentence simply does not even address digital sampling let alone the existence of a *de minimis* exception.²²⁹ While Section 114(b) “distinguishes between a digital reproduction and a recreation from scratch,”²³⁰ it does not indicate whether digital reproduction, or exact copying, of *de minimis* parts of sound recordings is permissible.²³¹ There is “no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law—which, for decades prior to adoption of the 1976 Act and unceasingly in the decades since, has included the requirement of substantial similarity.”²³²

The Copyright Act does allow for a *de minimis* exception, but as this Section has suggested, an analysis of the plain meaning of Section 114(b) is of little utility. Section 114(b) merely narrows the scope of copyright protection for sound recordings, without specifically providing for a *de minimis* exception.²³³ Although it is enough that the plain meaning of the Act does not even address whether there is a *de minimis* exception let alone preclude it, the Ninth Circuit focused part of its analysis on responding to the Sixth Circuit’s argument regarding the nature of a sound recording.²³⁴ As the Ninth Circuit put it, however, the “theoretical difference” between sound recordings and other types of copyrighted works “does not mean that Congress *actually adopted* a different rule.”²³⁵ The Ninth Circuit could have been more direct in

²²⁸ *VMG Salsoul*, 824 F.3d at 884. See *supra* Sections II.A.3, II.B.3. *Bridgeport* can be viewed as emphasizing that “handmade recreations are privileged while mechanical reproductions are not.” Joseph P. Fishman, *The Copy Process*, 91 N.Y.U. L. REV. 855, 876 (2016).

²²⁹ The Ninth Circuit in *VMG Salsoul* did say that the third sentence did not address “whether Congress intended to eliminate the longstanding *de minimis* exception for sound recordings in all circumstances.” *VMG Salsoul*, 824 F.3d at 883. The court, however, later went on to quote the Sixth Circuit’s interpretation of Section 114(b)’s third sentence without fully addressing the Sixth Circuit’s flawed interpretation, thereby taking away the focus from the simple fact that there is no mention of the *de minimis* exception in the third sentence. *Id.* at 884.

²³⁰ Fishman, *supra* note 228, at 900.

²³¹ 17 U.S.C. § 114(b).

²³² *NIMMER & NIMMER*, *supra* note 57, at § 13.03[A][2][b]. See *Saragema India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1340 (S.D. Fla. 2009), *aff’d*, 635 F.3d 1284 (11th Cir. 2011)–(internal citations omitted). Furthermore, the Sixth Circuit’s interpretation creates “in essence a new right, the right to claim copyright protection in what standing by itself would not be copyrightable.” 4 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBL. & THE ACTS* § 9:9 cmt. (3d ed. 2016).

²³³ See *MCLEOD & DICOLA*, *supra* note 21, at 233.

²³⁴ *VMG Salsoul*, 824 F.3d at 885.

²³⁵ *Id.*

simply emphasizing the fact that Section 114(b) makes no mention of a *de minimis* exception. Statutory interpretation, however, is not futile. An examination of the enactment history, statutory structure, and jurisprudence indicate more explicitly that the Copyright Act allows for this exception to apply to the unauthorized use of copyrighted sound recordings.²³⁶

B. *Enactment History*

Since digital sampling was not a practice in the 1970s, the Sixth Circuit posited that the legislative history of the Copyright Act was of little utility in interpreting the Act.²³⁷ The enactment history,²³⁸ however, explicitly indicates that the principle of substantiality applies to Section 114(b): “infringement takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced.”²³⁹ Thus, although the Sixth Circuit in *Bridgeport* chose to ignore the legislative history and did not consider the enactment history on the grounds that “digital sampling wasn’t being done in 1971,”²⁴⁰ Congress clearly maintained the substantial similarity doctrine and thus, the *de minimis* exception.

Additionally, Congress had the foresight to provide for future technological developments in the area of copyright.²⁴¹ Section 102 of the Copyright Act explicitly states that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or *later developed*.”²⁴² Thus, even if digital sampling was not being done in the early 1970s as the Sixth Circuit asserted,²⁴³ Congress allowed for the Copyright

²³⁶ See *infra* Sections V.B–D.

²³⁷ See *Bridgeport, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

²³⁸ Enactment history is a less controversial canon of construction than legislative history. See Lawrence M. Solan, *Is it Time for a Restatement of Statutory Interpretation?*, 79 BROOK. L. REV. 733, 734, 744 (2014) (explaining that there is disagreement over the use of legislative history, but less controversy over the use of other canons of construction, including enactment history). Enactment history reflects the history of changes from one iteration of an act to the next, while legislative history includes reports of floor debates and committee reports. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1201 (2010); *id.* The Sixth and Ninth Circuits do not distinguish between legislative history and enactment history in *Bridgeport* and *VMG Salsoul* respectively. The focus of this portion of the statutory interpretation is enactment history.

²³⁹ H.R. REP. NO. 94-1476, 106 (1976) (emphasis added).

²⁴⁰ *Bridgeport*, 410 F.3d at 805.

²⁴¹ 17 U.S.C. § 102(a) (2012).

²⁴² *Id.* (emphasis added).

²⁴³ See *Bridgeport*, 410 F.3d at 805.

Act to cover this type of process.²⁴⁴ Because Congress made it clear that the Act can adapt to technological changes, there is no need to go through the long process of legislative change to reword the Act so that it explicitly allows for a *de minimis* exception for the unauthorized use of sound recordings. Furthermore, even without this explicit enactment history, the Sixth Circuit could have relied on the Supreme Court's decision in the 1991 case *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, in which the Court included "copying of constituent elements of the work that are original" as part of the elements of copyright infringement.²⁴⁵

Above all, both the Sixth and Ninth Circuits failed to focus on an important aspect of the Act's history—the Constitution's Copyright Clause.²⁴⁶ The framers included the Copyright Clause in the nation's Constitution to protect creativity, and subsequent lawmakers formulated copyright laws to balance the interest in protecting original works with the interest against stifling creativity pursuant to the clause.²⁴⁷ A *de minimis* exception for the unauthorized use of sound recordings reflects the balance that the nation's founders sought to strike by allowing artists to continue to sample while substantially protecting artists' original works.

C. Statutory Structure

An examination of the statutory structure further supports the conclusion that Section 114(b) allows for a *de minimis* exception.²⁴⁸ As David Nimmer—author of a leading treatise on copyright law—points out, the rights of copyright owners enumerated in Section 106²⁴⁹ are subject to limitations imposed on those rights by subsequent sections.²⁵⁰ Section 114 "has carved out some exceptions to the rights that the copyright owners of sound recordings would otherwise have had pursuant to Section 106."²⁵¹ Every right that Section 106 grants "has always been subject to a substantial similarity analysis."²⁵² Thus, as Nimmer opines, "it defies precedent for

²⁴⁴ See 17 U.S.C. § 102(a); SAMUELS, *supra* note 28, at 127.

²⁴⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

²⁴⁶ See *supra* Section I.A.

²⁴⁷ See U.S. CONST. art. I, § 8, cl. 8.; Blessing, *supra* note 28, at 2406.

²⁴⁸ See NIMMER & NIMMER, *supra* note 57, at § 13.03[A][2][b].

²⁴⁹ See *id.*

²⁵⁰ *Id.* Sections 107 through the end of Chapter 1 of the Copyright Act impose limitations on the rights set forth in Section 106. *Id.*

²⁵¹ SCHULENBERG, *supra* note 2, at 510.

²⁵² NIMMER & NIMMER, *supra* note 57, at § 13:03[A][2][b].

Bridgeport Music to blithely discard that requirement.”²⁵³ Nimmer further notes that:

when one reflects that Section 114 imposes a *limitation* on the rights granted copyright holders by Section 106, it becomes even less comprehensible how the court could interpret Section 114 to *expand* the rights enjoyed by proprietors, such that they do not need to demonstrate substantial similarity between defendant’s purportedly infringing production and their own copyrighted works.²⁵⁴

Furthermore, precluding a *de minimis* exception for sound recordings has “broad consequences” affecting more than just sound recordings—without a *de minimis* exception for sound recordings, “the *de minimis* rule for musical compositions becomes less meaningful for samplers, because most samples infringe both the sound recording and the musical composition copyrights in the sampled song.”²⁵⁵

D. Jurisprudence

Courts have applied the *de minimis* doctrine for centuries across all areas of law.²⁵⁶ Thus, as the Ninth Circuit cautioned in *VMG Salsoul*, “we [should be] particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.”²⁵⁷ The Sixth Circuit’s bright-line rule in *Bridgeport* was “at odds with the balance of jurisprudence” on substantial similarity in the copyright realm.²⁵⁸ In light of jurisprudence in this area of law, one commentator said that the Sixth Circuit’s decision in *Bridgeport* was “a stain on copyright jurisprudence,”²⁵⁹ which is why “no court outside of the Sixth Circuit has adopted it.”²⁶⁰

What the Ninth Circuit failed to acknowledge was that a *de minimis* standard is more difficult to apply than a bright-line rule and can lead to disparate treatment even if it is applied across all jurisdictions. In light of the jurisprudence on

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ MCLEOD & DICOLA, *supra* note 21, at 233–34 (2011).

²⁵⁶ See Andrew Inest, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 946, 948 (2006).

²⁵⁷ VMG Salsoul, LLC v. Ciccone, 842 F.3d 871, 883 (9th Cir. 2016).

²⁵⁸ NIMMER & NIMMER, *supra* note 57, at § 13:03[A][2][b].

²⁵⁹ Donahue, *supra* note 81. “I can’t impress upon you how poorly *Bridgeport* was decided, and I think most copyright lawyers who don’t have a dog in the fight would agree.” *Id.* (statement of “Paul M. Fakler, a partner with Arent Fox who specializes in music law”).

²⁶⁰ Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 56 (2014).

the *de minimis* exception in both the legal field generally and in the area of copyright law in particular, however, those in and out of the music industry would be better off with a *de minimis* standard than a bright-line rule against unauthorized sampling. Bright-line rules should not be imposed just for the sake of ease of enforcement. Not to mention, the Copyright Act *does* allow for a *de minimis* exception for the unauthorized use of copyrighted sound recordings.²⁶¹

E. Recommendation

In contrast to the Sixth Circuit's interpretation, this note's "literal reading"²⁶² of the Copyright Act and examination of the enactment history and relevant jurisprudence indicate that a *de minimis* exception is available for sound recordings. Rather than leaving it up to the music industry to lobby Congress for a legislative change, the Supreme Court should clarify Section 114(b) in its present form. Although some may argue that it is dated and cannot keep up with technological changes,²⁶³ the Copyright Act can be viewed as a living document, similar to the U.S. Constitution. This is evidenced by Section 102 of the Copyright Act stating that it applied to "works of authorship fixed in any tangible medium of expression, now known *or later developed*."²⁶⁴ The principles the Act contains still hold true, and the doctrine of *de minimis non curat lex* underlies all legal principles.

A resolution of the circuit split should come in the form of a judicial ruling, specifically from the Supreme Court. The Supreme Court should conduct a statutory interpretation analysis similar to the one conducted in this Part of the note. Unlike the Ninth Circuit, the Supreme Court should conduct an analysis that is more focused on the simple fact that Section 114(b) does not even address *de minimis* sound sampling and that is more focused on the original legislative intent behind the Copyright Act as a whole, as prescribed by the Constitution's Copyright Clause. By doing so, the Supreme Court should make it abundantly clear that the Copyright Act in its current form provides a *de minimis* exception for the unauthorized use of sound recordings.

²⁶¹ See *supra* Sections V.A–C.

²⁶² *Bridgeport, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

²⁶³ See Kyle Wiens, *The End of Ownership: Why You Need to Fight America's Copyright Laws*, WIRED (Jan. 17, 2014) [https://www.wired.com/2014/01/174071/\[https://perma.cc/N3Z6-AUR7\]](https://www.wired.com/2014/01/174071/[https://perma.cc/N3Z6-AUR7]).

²⁶⁴ 17 U.S.C. § 102(a) (2012) (emphasis added).

CONCLUSION

In light of the significance of the circuit split the Ninth Circuit created in the summer of 2016, it is important that the Supreme Court interpret the language of the Copyright Act to allow for a *de minimis* exception to unauthorized digital sampling. It has been said that “poetry can only be made out of other poems; novels out of other novels,” and perhaps the same holds true of music.²⁶⁵ Music sampling has become increasingly more popular with advances in technology,²⁶⁶ and so long as sampling is *de minimis*, it should not constitute copyright infringement. The alternative—a bright-line rule against unauthorized music sampling—would stifle creativity in the music industry. While a bright-line rule is easier to apply than a standard, courts should not, just for the sake of ease, read a bright-line rule into a law that is already fluid enough to allow a *de minimis* exception.

Without a resolution of the circuit split on the issue of whether the Copyright Act allows for a *de minimis* exception for the unauthorized use of copyrighted sound recordings, many would-be music samplers may feel stifled by the Sixth Circuit’s decision, while other music samplers may shop around to circuits such as the Ninth in the hope of receiving a favorable decision. Awaiting a congressional change to the Copyright Act, aside from seeming unnecessary in light of this note’s statutory interpretation of the Act in its present form, could take years. It took over one hundred years for music to be protected,²⁶⁷ it should not take years more for a change that can more clearly and more quickly come from a Supreme Court interpretation. A thorough statutory interpretation approach, which would include an analysis of Section 114(b) in the context of Sections 102 and 106, along with an analysis of both the enactment history and relevant jurisprudence would make it abundantly clear that the Copyright Act allows for a *de minimis* exception for the unauthorized use of copyrighted sound recordings.

Thus, if the opportunity arises, which it very likely will,²⁶⁸ the Supreme Court should sing to the well-known tune of the

²⁶⁵ MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 2 (1993). This quote is attributed to Northrop Frye, a Canadian literary critic. *Id.*

²⁶⁶ See Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 361 (2008).

²⁶⁷ See Schietinger, *supra* note 24, at 216; see also SAMUELS, *supra* note 28, at 31.

²⁶⁸ Although people differ as to the likelihood of the Supreme Court deciding this issue, at least in the near future, many acknowledge that in light of the circuit

legal maxim, *de minimis non curat lex*, and find that the Copyright Act of 1976, as it is written, allows for a *de minimis* exception. Simply put, the law does not concern itself with trifles.

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split, a Supreme Court decision on this issue is feasible. Miller, *supra* note 185; Robert J. Bernstein & Robert W. Clarida, *Circuit Split Creates Uncertainty in Sampling of Sound Recordings*, THE NEW YORK LAW JOURNAL (June 15, 2016), <http://www.newyorklawjournal.com/id=1202760031646/Circuit-Split-Creates-Uncertainty-in-Sampling-of-Sound-Recordings?mcode=0&curindex=0&curpage=ALL> [<https://perma.cc/8SV9-E67G>]; Bentz & Busch, *supra* note 195; Ira S. Sacks & Julia R. Lissner, *Ninth Circuit “Strikes a Pose” For Madonna and Music Sampling in “Vogue” Copyright Dispute*, LEXOLOGY: MARKS, WORKS & SECRETS (June 7, 2016), <http://www.lexology.com/library/detail.aspx?g=0bc4a678-2f8e-448e-9df6-c62887628b5e> [<https://perma.cc/VA6J-XC42>]; *see also supra* Part IV.

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